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IN THE UNITED STATES PATENT AND TRADEMARK OFFICE
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD

Proceeding	91210234
Party	Plaintiff Carole A. Faulkner dba C I Host
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Date	12/17/2014
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CAROLE FAULKNER, INDIVIDUALLY	§	
AND D/B/A C I HOST, AND	§	In the Matter of Application
CHRISTOPHER FAULKNER,	§	Serial No. 85703135
INDIVIDUALLY AND D/B/A C I HOST;	§	
	§	Mark: C I Host
Opposers,	§	
v.	§	Opposition No. 91210234
	§	
GARY DOMEL,	§	
	§	Published: February 12, 2013
Applicant.	§	

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OPPOSER'S TRIAL BRIEF
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Class IC 042 for use in connection with “designing and implementing websites for others on a global computer information network; hosting the web sites of others on a computer server for a global computer network; graphic art design computer software design for others; and computer consultation” (the “Applicant’s Services”). The Application for the Mark was published for opposition in the Official Gazette on February 12, 2013. On April 12, 2013, the Opposers timely filed a Notice of Opposition to Registration of Trademark Serial Number 85703135. Opposer’s Notice of Opposition is based on likelihood of confusion due to Opposer’s prior and continuous use of the Mark.

C. Description of the Record

Opposer has submitted:

(1) Notice of Reliance Pursuant to Rule 2.122(e)

TESS printout showing the Opposer’s prior registration in the C I Host mark

TESS printout showing the Opposer’s current application for the C I Host mark

GoDaddy.com printout showing ownership of domain name

C I Host website

C I Host Press Releases and Articles

Texas Franchise Tax Public Information Reports

Assumed Name Certificate

C I Host Copyright Information

Registrar Accreditations Agreement with ICANN

Texas Secretary of State formation documents for C I Host, Inc.

Texas Secretary of State formation documents for C I Host Corporation

California Secretary of State formation documents for C I Host Corporation

(2) Notice of Reliance Pursuant to Rule 2.120 (j)

Applicant's Responses to Opposer's First Set of Interrogatories

(3) Notice of Reliance Pursuant to Rule 2.120 (j)

Transcript of discovery deposition of Applicant Gary Domel

(4) Notice of Reliance Pursuant to FRE 201(b)

Request for Judicial Notice of Ch. 9 of the Texas Business & Commerce Code

(5) Transcript of trial testimony deposition of Opposer Carole A. Faulkner

Applicant did not take any trial testimony depositions nor did he submit any evidence during his testimony period.

II. STATEMENT OF FACTS

The Opposers do business as C I Host. They have always done business as C I Host. The Opposers have continuously and exclusively utilized the "C I Host" mark in commerce in connection with web hosting and design services, and done business as C I Host since its inception in 1995. Since 1995, Opposers operated the business C I Host as a sole proprietorship/partnership. On February 4, 1999, the business C I Host, Inc. was incorporated as a Texas corporation. *See* Exhibit 1 to Carole Faulkner's deposition.¹ In late September 2000 C I Host Corporation was formed in California, and on September 29, 2000 C I Host Corporation filed an application for registration of the mark C I Host, Serial No. 78028225. *Id.* at Exhibits 3 and 4, respectively. The mark was registered on October 12, 2004 (but it was later cancelled on May 13, 2011). On or about May 17, 2002, C I Host Corporation was incorporated in Texas. *Id.* at Exhibit 2. Prior to May 2002, Opposers did business as C I Host Corporation. C I Host

¹ The exhibits attached to Carole Faulkner's deposition are also included under Opposer's Notice of Reliance Pursuant to Rule 2.122(e). Furthermore, Opposers would refer this Board to the entirety of Carole Faulkner's deposition. However, for purposes of highlighting certain key points Opposers will cite to certain portions of the deposition transcript.

Corporation gave C I Host, Inc. permission to use the mark. C I Host, Inc. is currently a Texas corporation in good standing.

Prior to 2012 Christopher Faulkner was the majority shareholder in C I Host, Inc. and CEO. Currently, Carole Faulkner is the sole shareholder of C I Host, Inc. and Christopher remains the CEO of C I Host.

C I Host continues to offer internet hosting, design, and other related web services to customers throughout the United States and internationally including but not limited to the following services: application service provider (ASP), namely, hosting computer software applications of others; computer services, namely, cloud hosting provider services; computer services, namely, interactive hosting services which allow the user to publish and share their own content and images on-line; consulting services in the field of hosting computer software applications; design, creation, hosting and maintenance of internet sites for third parties; design, creation, hosting, maintenance of websites for others; developing and hosting a server on a global computer network for the purpose of facilitating e-commerce via such a server; hosting internet sites for others; hosting of digital content on the Internet; hosting of web sites; hosting the software, websites and other computer applications of others on a virtual private server; hosting the web sites of others on a computer server for a global computer network; hosting websites on the Internet; maintenance of websites and hosting on-line web facilities for others; providing an online website for creating and hosting micro websites for businesses; technical support services, namely, remote administration and management of in-house and hosted datacenter devices, databases and software applications; web site hosting services” (“C I Host Services”). *See also* Id. at pg. 7, ln 23-25; pg. 8, ln 1-16; pg. 9, ln 20-25; pg. 11, ln 1-20; pg. 18, ln 16-25; pg. 19, ln 1-4.

Since 1995, the Opposers have undertaken widespread internet and print advertising, provided extensive interviews and attended numerous annual tradeshows to promote the mark of “C I Host” and C I Host Services, including extensive internet advertising and maintenance of the website located at www.cihost.com. Opposers have expended substantial funds, time, and energy to promote and advertise the mark C I Host in connection and association with the C I Host Services throughout the United States.

On August 14, 2012, Domel filed the Application for C I Host that is currently being opposed. Opposers also have an application pending for the C I Host Mark, Serial No. 85732638 filed September 19, 2012. *Id.* at Exhibit 5. The sole basis for Domel’s claim to the mark C I Host is a purported foreclosure of a security interest on August 20, 2008, which purportedly included the C I Host mark. *See* paragraph 3 of Applicant’s Answer to Notice of Opposition. If Domel’s Application for the Mark is approved for registration in the Principal Register, Opposers will be severely damaged because they have continuously utilized the C I Host Mark, built goodwill in the C I Host Mark, and done business as C I Host for over nineteen years.

III. ARGUMENT AND AUTHORITIES

A. Opposers Have Continuously Used the Mark C I Host for Nearly 20 Years, and a Likelihood of Confusion Will Undoubtedly Result Should the Applicant Be Permitted to Register the Mark

Opposers are entitled to protection of their common law trademark “C I Host” as a result of their continuous and exclusive usage of the “C I Host” name in interstate commerce in connection with the C I Host Services. *See* Carole Faulkner’s deposition, pg. 11, ln 21-25; pg. 12, ln 1-9; pg. 29, ln 19-25; pg. 30, ln 1-4.

Opposers have priority in the Mark as Domel, contrary to his claim in his Application (for which he signed the Declaration), has neither used the Mark nor any version of “C I Host” nor

conducted any business known as C I Host or provided any of the Applicant's Services in connection with C I Host, and his only affiliation with C I Host is that of a creditor of the business known as C I Host, Inc. *See Id.* at pg. 16, ln 9-20. If Domel is now allowed to use the Mark in commerce it would confuse and deceive the public and would cause irreparable damage to Opposers, and to the goodwill and reputation of the "C I Host" Mark. *Id.* at pg. 17, ln 1-25; pg. 18, ln 1-15; pg. 30, ln 17-24. Simply put, the Opposers have used the Mark continuously since 1995, without any intervening use by the Applicant.

The Mark that Domel is attempting to register, and the goods and/or services for which he is attempting to register the Mark, are identical to the common law trademark that Opposers have previously and continuously used and offered. Opposers have and continue to own the C I Host domain name and website. *See Id.* at Exhibits 6, 7 and 12. Press releases clearly substantiate that C I Host has always belonged to Opposers. *Id.* at Exhibit 8. Opposers have been the ones maintaining the name C I Host and attending to administrative duties of the C I Host business. *Id.* at Exhibits 9 and 10. Furthermore, other intellectual property, such as the copyright associated with the C I Host website, has been owned by Opposers. *Id.* at Exhibit 11. The Opposers have expended substantial funds, time and energy in utilizing and maintaining this name. *Id.* at pg. 19, ln 5-25; pg. 20, ln 1-10. Likelihood of confusion between Domel's use (if he ever uses the Mark) and Opposer's use of the Mark is unquestionable.

Registration of a trademark that so nearly resembles the corporate name of opposer as to be likely to produce public confusion does not justify registration of the trademark. No mark by which the goods of the owner of the mark may be distinguished from other goods of the same class shall be refused registration as a trademark on account of the nature of such mark unless such mark so nearly resemble(s) a registered or known trade mark owned and in use by another,

and appropriated to merchandise of the same descriptive properties as to be likely to cause confusion or mistake in the mind of the public or to deceive purchasers. *See Tidy-House Paper Products, Inc. v. Tidy House Products Co*, 38 C.C.P.A. 1099, 189 F.2d 280 (May 8, 1951)

Opposers have proprietary rights in the “C I Host” Mark that are superior to those of Domel. The identical nature of the marks in sight, sound and meaning along with the identical services warrant the dismissal of Domel’s Application. In further support of the dismissal of Domel’s Application is that the trade channels and classes of purchasers of the good and/or services are identical; the similarity of the conditions under which a buyer encounters the marks would be such that there would undoubtedly be confusion. Prospective purchasers may mistakenly believe that the two goods and services marketed under the marks “C I HOST” and “C I Host” would have the same source or origin and the identical marks would more than likely cause confusion, mistake or deceive purchasers (should Domel use the Mark which he has not done). *See Sundure Paint Corporation, Appellant, v. Maas & Waldstein Co.*, 46 C.C.P.A. 926, 267 F.2d 943. Therefore, Domel’s application should be denied.

B. Applicant Has Never Used the Mark, Nor Does He Have an Intention of Using the Mark

There is no dispute that the Applicant has never used the Mark C I Host in any manner whatsoever. He never used the Mark prior to the purported foreclosure, and he has never used it since. To this day, the Applicant’s only connection to this Mark is through the filing of the application that is the subject of this opposition. The best evidence of this is the Applicant’s own testimony. The Applicant admits to the following: (1) He has not utilized any domain name incorporating the words C I Host, (2) he never attempted to prohibit the Opposers from continuing to use their business name, (3) he has never filed any assumed name certificates for

the Mark, (4) he never made any use of the Mark since the foreclosure, (5) he never advertised services using the Mark, (6) he has no intent of ever using the Mark, (7) he does not even know “what to do with the Mark”, and (8) he does not know if the Mark has any value attached to it. Opposers will refer the Board to deposition excerpts of Gary Domel identified in their Notice of Reliance Pursuant to Rule 2.120(j) (particularly pages 48-53, 55-60, 62, 63-65). This evidence clearly demonstrates that the Applicant has never used the Mark and has no intention of doing so in the future.

C. Applicant Made False Statements in His Application

In his Application, Domel warrants and represents that he is the owner of the Mark and his address is 1851 Central Drive, Suite 110, Bedford, Texas 75001. The Application filed by Domel on August 14, 2012 was based on Domel’s alleged use of the Mark since April 1, 1995. However, as demonstrated in the previous section, Domel has never used the Mark and has no intent to use the Mark in commerce much less in the class in which he applied for registration. In fact, Domel simply copied the prior registration submitted by the Opposers in 2001. *See* Opposer’s prior application, attached as Exhibit 4 to the deposition of Carole Faulkner, and compare with the Applicant’s current application. Domel has never maintained an office, business, or operated using the name C I Host at any address including the 1851 Central Drive, #110, Bedford, TX address. The business known as C I Host, owned and controlled by Opposers, moved their offices in 2004 from 1851 Central Drive, Bedford, TX 76021. Since 2009, the building at 1851 Central Drive has been vacant. As of this date, the building at 1851 Central Drive, Bedford Texas that Domel represented was the office of C I Host has been demolished. *See* Deposition of Carole Faulkner, pg. 15, ln 10-25; pg. 16, ln 1-8; pg. 20, ln 14-25, pg. 21, ln 1-4.

Furthermore, Applicant's Application should not be granted because it was not filed based on Applicant's actual use of C I Host or C I HOST as a trademark with each and every one of Applicant's Services, and Domel failed to satisfy the requirements of Trademark Act Section 1(a) and related Trademark Rules and Regulations. *See also* Deposition of Carole Faulkner, pg. 21, ln 10-25. Domel represented to the trademark office that he has used the C I Host mark since 1995, and that by filing a 1(a) application he was also representing that he will continue to use the Mark in the future. As the evidence clearly demonstrates, these are false statements.

An applicant or registrant commits fraud when he knowingly makes false, material representations in any sworn declaration submitted to the USPTO with the intent to deceive the Office. These would include sworn declarations accompanying applications and statements of use. Grounds for fraud include whether the applicant was making bona fide use of the mark in connection with all of the identified goods and services as of the filing date of an application under Section 1(a). Domel never utilized the Mark in commerce in connection with or to identify any goods or services of the type described in Class IC 042, or at all. Domel merely utilized and copied the public information through the USPTO from the Prior Trademark Registration of "C I Host" held by C I Host Corporation, a company owned and controlled by Opposers.

The only association that Domel has ever held with the corporation C I Host, Inc. was as a creditor of the Company. Domel was never in privity with C I Host, Inc., C I Host Corporation, or done business as C I Host. *See* Deposition of Carole Faulkner, pg. 22, ln 1-8. Domel has filed his trademark application for the Mark to harass the Opposers, without any intent to use the Mark in connection with any goods or services, and in fraudulent violation of his Declaration and 18 U.S.C. Section 1001, et al. *See Id*, pg. 30, ln 5-8. Domel similarly makes

false statements in his interrogatory responses, claiming use of the Mark that simply never existed. *See* Opposer's Notice of Reliance Pursuant to Rule 2.120(j), Responses to Interrogatory Nos. 1 and 2.

Opposers are the only persons/entities that own the common law trademark "C I Host" or that have continually and exclusively used the Mark and "C I Host" in connection with goods and services in commerce since 1995. Domel's Application should be dismissed because of the fraudulent statements contained therein and his attempt to fraudulently procure the Mark. By attempting to register the Mark, Domel is attempting to restrain the trade of the Mark owned by Opposers.

D. The Purported Security Interest in the Mark is Void Since It Did Not Encompass the Goodwill of C I Host

As stated earlier, the Applicant's sole basis for laying claim to the Mark is a purported foreclosure of a security interest. *See* paragraph 3 of Applicant's Answer to Notice of Opposition. However, the Applicant has presented no evidence of this foreclosure or a security agreement encompassing the Mark at issue. Furthermore, there was never an intent to include the C I Host mark itself, let alone the goodwill of C I Host as part of any security agreement between the parties, nor was goodwill ever referenced to or included in any security agreement. *See* Deposition of Carole Faulkner, pg. 24, ln 7-22; pg. 29, ln 2-12. Further proof of this is that the purported collateral referenced by Applicant in his Answer pertained to the assets of C I Host, Inc. However, the mark C I Host belonged to C I Host Corporation, **not** C I Host, Inc. *See Id.*, pg. 24, ln 23-25, pg. 25, ln 1-25, pg. 26, ln 1-18. As to the issue of goodwill, a trademark cannot be sold or assigned apart from the goodwill it symbolizes. *Marshak v. Green*, 746 F.2d 927, 929 (2nd Cir. 1984). If ownership of a mark is transferred without the associated goodwill, the

transfer is deemed to be an “assignment in gross” and therefore void ab initio. *See Sugar Busters LLC v. Brennan*, 177 F.3d 258, 265 (5th Cir. 1999). For purposes of this analysis, security agreements and assignments fall under the same class of instruments affecting title to trademarks. *See Trademark Manual of Examining Procedure* § 503.02. Trademark law provides that a mark “shall be assignable with the goodwill of the business in which the mark is used.” *See* 15 U.S.C § 1060(a)(1). A transfer of goodwill not only requires a strict recitation of such, but also requires that the assignee use the mark for the same services that were being offered by the assignor. *See Sugar Busters LLC*, 177 F.3d at 265. Even if a security agreement specifically included the goodwill of a business along with the mark (which it did not in this case), if the assignee/transferee never played an active role in the business associated with the mark, never actually acquired the goodwill, or never used the mark themselves, then the transfer is invalid as an assignment in gross. *Haymaker Sports, Inc. v. Turian*, 581 F.2d 257, 261 (C.C.P.A. 1978). The goodwill of C I Host was never a part of any security agreement, and it was never the intent that goodwill would ever be made of part of any collateral. Furthermore, the Applicant never used the mark or any associated goodwill since the purported transfer. This conclusively establishes that there was never a transfer of the C I Host goodwill. As such, any claim or right under security agreement is null and void.

E. The Purported Security Interest in the Mark is Void Since It Did Not Follow the Strict Requirements of the UCC

The Applicant claims that he owns the rights to the C I Host mark as a result of a purported foreclosure of a security interest. The Applicant has not presented any evidence of a security agreement or a foreclosure of same. An exhibit to the Applicant’s Answer makes reference to an exercise of remedies under Section 9.620 of the Texas Business and Commerce

Code. Any attempt at foreclosure by the Applicant is of no effect, since the strict requirements of the Texas UCC were not followed.² *See* Opposer's Notice of Reliance Pursuant to FRE 201(b). Specifically, any acceptance of collateral in full or partial satisfaction of an obligation is valid only if: **the secured party does not receive, within the time set forth in Subsection (d), a notification of objection to the proposal authenticated by a person to which the secured party was required to send a proposal to.** Texas Business and Commerce Code, Section 9.620(a)(2)(A). The Opposers did not have an opportunity to make this objection because notice of the foreclosure was not sent. *See* Deposition of Carole Faulkner, pg. 27, ln 18-22; pg. 28, ln 11-14. Therefore, any foreclosure of a security interest is not valid and cannot serve as the basis for the Applicants rights in the Mark.

F. To the Extent the Applicant Ever Acquired Any Rights to the Mark, These Rights Are Forfeited Due to Abandonment

Even if the Applicant can prove a valid security interest, proper foreclosure under the UCC, a valid transfer of goodwill, and a proper application for registration of the Mark, the Applicant can still not maintain a credible and supportable claim to the Mark due to abandonment. To the extent Applicant believes that he was ever a valid owner of this Mark, he cannot in good faith argue to this Board that he has maintained use of the Mark, since the record is devoid of any such premise. A trademark is abandoned if its use in commerce has been discontinued with no intent to resume use. A mark shall be deemed abandoned when its use has been discontinued with intent not to resume such use. Intent not to resume may be inferred from the circumstances. Nonuse for 3 consecutive years shall be prima facie evidence of abandonment. "Use" of a mark means the bona fide use of such mark in the ordinary course of

² It is worth noting that the Applicant initially attempted to "foreclose" on a security interest by filing a petition with the district court for judicial foreclosure. However, the court never issued such an order. *See* Deposition of Carole Faulkner, pg. 27, ln 18-22.

trade, and not made merely to reserve a right in the mark. *See* Lanham Act, § 45, 15 U.S.C.A. § 1127. *See also Specht v. Google*, 747 F.3d 929, 934 (7th Cir. 2014) (“A prima facie showing of abandonment may be rebutted with evidence excusing the nonuse or demonstrating an intent to resume use, but the intent to resume use in commerce must be formulated within the three years of nonuse, and the use must pertain to the provision of services). There is no dispute that the Applicant satisfies all of the above criteria for abandonment, since he has never used the Mark and has no intention of using the Mark in the future. Furthermore, taking the Applicant’s stated date of an August 20, 2008 foreclosure in his Answer, it has been well over three years that Applicant has demonstrated his nonuse.

IV. CONCLUSION AND PRAYER

In conclusion, Opposers have established to this tribunal that they hold a superior right to the trademark “C I Host” from their usage of the mark in commerce since 1995. It is Opposers’ belief that they will suffer irreparable damage if Domel is allowed to register the mark “C I HOST”. The likelihood of confusion by the public between his alleged mark “C I HOST” and the Opposers’ common law mark of “C I Host” is unquestionable and will result in injury to the Opposers. Opposers have owned and done business under the entity name of C I Host in the United States since 1995, and such name has been affixed in connection with all of their goods and services. The purpose of the trademark statutes are the promotion of the interests of the trade and commerce of the country and the protection of trademarks which are lawfully used or owned by those engaged in such trade and commerce. Domel should not be rewarded for his deliberate, fraudulent and material misrepresentations to the USPTO and his attempts to harm Opposers by “sticking C I Host in a drawer”.

WHEREFORE, Opposers, Carole Faulkner, individually and d/b/a C I Host and Christopher Faulkner, individually and d/b/a C I Host respectfully request that the Board sustain this Opposition and deny the registration of the C I HOST Mark to Gary Domel, and grant Opposers such further relief, at law or in equity, to which they may justly show themselves entitled.

Respectfully submitted,

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PROOF OF SERVICE

This is to certify that on the 17th day of December, 2014, a true and correct copy of the above and foregoing document was served upon the attorneys of record for Gary Domel via certified mail.

/s/ Andy Nikolopoulos
Andy Nikolopoulos